

**BUREAU OF
RAILWAY ECONOMICS**

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**The Conflict Between
Federal and State Regulation
of the Railways**

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BULLETINS OF THE BUREAU OF RAILWAY ECONOMICS

1. Summary of Revenues and Expenses of Steam Roads in the United States for July, 1910. (Monthly Report Series Bulletin No. 1.)
2. Summary of Revenues and Expenses of Steam Roads in the United States for August, 1910. (Monthly Report Series, Bulletin No. 2.)
3. Summary of Revenues and Expenses of Steam Roads in the United States for September, 1910. (Monthly Report Series, Bulletin No. 3.)
4. A Comparative Statement of Physical Valuation and Capitalization.
5. Preliminary Bulletin for November, 1910—Revenues and Expenses.
6. Railway Traffic Statistics.
7. Summary of Revenues and Expenses of Steam Roads in the United States for October, 1910. (Monthly Report Series Bulletin No. 4.)
8. Summary of Revenues and Expenses of Steam Roads in the United States for November, 1910. (Monthly Report Series, Bulletin No. 5.)
9. Summary of Revenues and Expenses of Steam Roads in the United States for December, 1910. (Monthly Report Series, Bulletin No. 6.)
10. Summary of Revenues and Expenses of Steam Roads in the United States for January, 1911.
11. Comment on the Decision in the Western Advanced Rate Case, No. 3500. (Out of Print.)
12. Summary of Revenues and Expenses of Steam Roads in the United States for February, 1911.
13. Summary of Revenues and Expenses of Steam Roads in the United States for March, 1911.

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The numbering of the monthly bulletins as a separate series was abandoned with the December issue. Since then all bulletins issued by the Bureau have been given a consecutive number only.

The Conflict Between Federal and State Regulation of the Railways

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PREFACE.

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A recent letter from Mr. Edwin A. Pratt, the English writer on railways, to the Director of the Bureau of Railway Economics, says:

"I should very much like to have for the purposes of a work on which I am now engaged, a few facts as to the nature and extent of the control exercised by the various States—supplementing that of the Interstate Commerce Commission—on the railways of your country. At a meeting last night of the Political Economy Club, to which I was invited as a guest, a discussion was started on the subject during which the view was expressed that the control by the States was becoming so oppressive that it would be difficult for the country to avoid being forced into government ownership of the railways in the proximate future, and there was a very interesting debate thereon.

"Would it be troubling you too much to favor me with a few details which would enable me to state the position clearly?"

In the thought that the statement prepared in response to Mr. Pratt's request may be of interest to the members of the Bureau, it is incorporated in this bulletin.

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THE CONFLICT BETWEEN FEDERAL AND STATE REGULATION OF RAILWAYS.

For convenience of reference the provisions of the Constitution of the United States conferring and limiting the powers of Federal and State regulation of railways are set forth as follows:

The Congress shall have power: * * * To regulate commerce with foreign nations and among the several States, * * *. Section 8, Article I.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Paragraph 2, Article VI.

The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Amendment X.

No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation. Amendment V.

* * * nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Section 1, Amendment XIV.

The effect of these provisions of the Constitution upon the power of the Federal Government and the States to regulate railways may be summarized as follows:

The Federal Government exercises delegated powers only; all powers not expressly delegated to it by the Constitution

or prohibited to the States may be exercised by the States. In the exercise of its delegated powers the Federal Government is supreme, but the power of a State over any matter as to which power has been delegated to Congress, is largely determined by the question of whether Congress has exercised its delegated power as affecting this subject-matter. If a Federal law is construed as regulating the whole of any subject-matter as to which power has been delegated to Congress or if State regulation conflicts with any Federal law, such State legislation is void. As the Federal Government is constantly exercising to a fuller extent the power to regulate interstate commerce, the necessary tendency is to restrict the powers of the States.

Under Section 8, Article I of the Constitution, exclusive power to regulate railway operations, practices and charges affecting the transportation of persons or property where, in the course of such transportation, State lines are crossed, is delegated to the Federal Government, the only restriction upon its power in this field being the provision of Amendment V that "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." It follows that it is not within the power of Congress to impose regulations which shall have the effect of depriving the railway company of its property without due process of law or of taking its property without just compensation, and the United States Supreme Court has held that the use of property, in all legitimate ways, is as much a right of property protected by the Constitution as is the property itself.

The power to regulate commerce wholly within a State, not having been delegated to Congress, is reserved to the States, respectively, under Amendment X of the Constitution. This gives to each State plenary power over all commerce or transportation which begins and ends within its borders, subject, however, to the provision of Section 1, Amendment XIV, which provides that no State shall "deprive any person of life, liberty or property without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.”

As, with few and unimportant exceptions, the railways of the United States are engaged in interstate commerce as well as in intrastate commerce, it is inevitable, under our dual system of government, that questions should arise as to the exact location of the line separating the jurisdiction of the Federal Government from that of the several States. This is frequently illustrated by questions as to whether the effect of regulations imposed by State authority may be to regulate or burden interstate commerce. It is the duty of all of the courts, State and Federal, to determine questions that arise as to whether an act of Congress is made in pursuance of the Constitution of the United States; and as to whether any provision of a State Constitution, or any act of a State Legislature is in violation of any provision of the Constitution of the United States. The United States Supreme Court is the final tribunal on all questions of Constitutional construction.

As questions as to the extent of the regulative powers, both of the Federal Government and of the States, are constantly being presented to the United States Supreme Court, the decisions of this court are gradually defining more sharply the extent of the Federal and State powers, respectively, and drawing the dividing line between them more clearly. The tendency of the decisions of this court seem to be strongly in the direction of the proposition that interstate railways must, in all substantial respects, be subject to one power, and the court now manifests a more decided tendency than in former years to hold that regulations of intrastate commerce which have the effect of regulating or burdening interstate commerce, are void as trenching upon the power delegated to Congress to regulate commerce among the States. There are some apparent exceptions to this, as in cases in which it has been held that, under its police power, a State may prescribe regulations affecting the movement of interstate commerce so long as such regulations only indirectly affect interstate commerce and do not regulate or burden it. An illustration

of this is the enactment by a State prescribing tests for color-blindness for locomotive engineers engaged within that State in the operation of interstate trains.

While each State possesses exactly the same power as to matters within its jurisdiction as is possessed by each of the other States, this power has been used in as many different ways as there are States in the Union, with the result that every interstate railway, in addition to being subject to the regulations imposed by the Federal Government, is subject to a different set of regulations in each State which it traverses.

Some of the States have used only a small fraction of their power to regulate intrastate commerce; others have endeavored to go far beyond it and have been kept within bounds only by the courts.

State regulative power has been exercised in a variety of ways. In some cases specific regulations have been enacted by State laws, and in other cases they have been prescribed by commissions under power delegated by the State Legislatures. Regulations have been prescribed covering passenger and freight charges, train operation, car supply, character of equipment and station buildings, hours of labor of employees and conditions of employment, safety appliances, and almost every conceivable phase of railway operation.

State acts and regulations prescribing maximum charges for the transportation of passengers and freight have caused much of the litigation between the railways and the States, and have frequently been held to be unconstitutional on the ground that the charges prescribed were so low as to be confiscatory under the Fourteenth Amendment, that they would deprive the railway of a reasonable return upon the value of its property. It is the contention of some able lawyers that the courts must ultimately go farther and hold that under the Constitution of the United States, just as under the Common Law of England, the railway cannot be deprived by legislation of just and reasonable compensation for each specific transportation service; that small profits will not justify the making of a greater

charge, and that large profits will not justify a lesser charge being fixed by any governmental authority. It is contended that the right given to the railways by the present interstate commerce law to make a reasonable charge for each service is but the legislative expression of a Constitutional right.

In some of the States efforts have been made to prevent the railways from testing the validity of State regulations in the courts.

Minnesota, in a freight rate act, and North Carolina, in passenger and freight rate acts attempted to do this by prescribing such severe penalties for the violation of the acts as to force the companies to comply therewith rather than run the risk of failing to prove the invalidity of the acts in criminal prosecutions. The Supreme Court of the United States held all of these acts to be unconstitutional and void.

Alabama, Arkansas, and Missouri attempted to keep the railways out of the United States courts by statutes which provided that any corporation chartered in any other State which should resort to a United States court should forfeit its right to do intrastate business in that State. These laws were overthrown by the United States Supreme Court as denying to the foreign corporations equal protection of the laws.

Section 720 of the Revised Statutes of the United States, provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State * * *." With this provision in view, Virginia attempted to evade the jurisdiction of the United States courts by creating a Corporation Commission with the powers of a court and fixing railway charges by court decrees rather than by acts of a legislative nature. This failed to be sustained by the United States Supreme Court, as it was held that, in fixing railway charges, the Virginia Corporation Commission, notwithstanding its powers and its form of procedure, was exercising legislative power and not judicial power.

As would naturally be supposed, the States have been com-

peting with each other for the purpose of securing advantages of commerce within their respective borders over that of any other State and over interstate commerce. This rivalry has been strikingly manifested in laws and regulations affecting car service. These have generally been termed "reciprocal demurrage" laws and have been based on the false theory that a demurrage charge imposed by a railway bears a reciprocal relation to a legislative penalty for failure to provide a car when demanded by a shipper.

The natural effect of such laws in times of car shortage would be to compel an interstate road to discriminate in favor of intrastate commerce in the State imposing the highest penalties, as against intrastate commerce in other States and against interstate commerce. North Carolina has gone farther than any other State in legislation of this character, having enacted a law providing that, upon failure to provide a car within 48 hours after demand, the railway should pay \$25.00 for the first day and \$5.00 for each subsequent day, the penalty for failure to provide facilities for less than carload shipments being \$12.50 for the first day and \$2.50 for each subsequent day. Subsequent legislation reduced these penalties. It may be that if a State should go to such extremes in this direction as to create material discriminations against, or impose material burdens upon, interstate commerce, such penalty laws would be held to be unconstitutional and void.

It will be seen that the effect of the recent decisions of the United States Supreme Court and of the fuller exercise of the legislative powers of Congress have been to give a broad construction to the clause of the Constitution delegating to the Congress power to regulate interstate commerce and to confine the power of the States within much narrower limits than those over which many of them have sought to exercise it. A recent decision by United States Circuit Judge Sanborn of the United States Circuit Court for the District of Minnesota, goes so far in this direction that if it shall be sustained by the United States Supreme Court and carried to its logical conclusion, it would seem to restrict the opportunities of

the States for oppressive regulation. The Legislature of the State of Minnesota had enacted statutes reducing passenger fares within that State about $33\frac{1}{3}$ per cent and reducing freight charges on certain commodities within the State about 7.37 per cent. By orders of the Minnesota Railroad and Warehouse Commission, general merchandise freight charges on shipments wholly within the State were reduced by from 20 to 25 per cent and certain specific charges on freight shipped from distributing points just within the borders of the State to other points in the State were reduced. Suits were brought by shareholders of the railways affected by these legislative acts and orders of the Commission, against the railway companies, the Attorney General of the State, and the Members of the Railroad and Warehouse Commission to prevent them from maintaining the reduced fares and rates on the grounds (1) that the orders of the Commission and the acts of the Legislature described, substantially burdened and regulated interstate commerce on the railroads of these companies, and (2) that their necessary effect was the confiscation of the property of the companies. Judge Sanborn found that "each of those acts and orders is violative of the Fourteenth Amendment of the Constitution and void." He further found that "each of the acts and orders challenged has the natural and necessary effect substantially to burden and directly to regulate interstate commerce, to create undue and unjust discriminations between localities in Minnesota and those in adjoining States, and it is unconstitutional and void." Interest in this decision centers in the finding last quoted above.

In this case the companies for the first time made an effective showing upon the facts as to the effect of State regulations upon interstate commerce and demonstrated that, although the regulations on their face related only to intrastate commerce, the effect of their application would necessarily be to require reductions of interstate charges. Upon this showing Judge Sanborn's decision was founded on the following propositions:

"To the extent necessary completely and effectually to pro-

tect the freedom of and to regulate interstate commerce the nation by its Congress and its courts may affect and regulate intrastate commerce, but no farther.

“To the extent that it does not substantially burden or regulate interstate commerce a State may regulate the intrastate commerce within its borders, but no farther.

“If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land, and ‘that which is not supreme must yield to that which is supreme.’ ”

Charges for interstate transportation and for intrastate transportation on the railways of the United States are so intimately interwoven and are so closely interdependent that, should Judge Sanborn’s decision be sustained by the United States Supreme Court, it will substantially deprive the States of the power of fixing transportation charges. It would seem also that, if carried to its logical conclusion, it may prevent the States from enacting so-called “reciprocal demurrage” laws carrying penalties for failure to supply cars so severe as practically to compel the railways, in times of car shortage, to discriminate in favor of intrastate traffic.

On the whole, the danger of control by the States “becoming so oppressive that it will be difficult for the country to avoid being forced into government ownership in the proximate future” is undoubtedly much less than it seemed to be a few years ago when the wave of drastic regulation was sweeping over the State Legislatures and commissions and their acts and orders had not yet been passed upon by the courts.

Of course, as a practical matter, the powers reserved to the States include some which do not in any way conflict with the delegation to Congress of the power to regulate commerce

among the States and which may still be used to an unreasonable degree, or so as to become oppressive.

By way of illustration, it may be mentioned that the commissions in some of the States show a tendency to require unreasonable and extravagant expenditures by the railways in the provision of large and handsome passenger stations at relatively small towns and to make unreasonable requirements as to the maintenance of roadbed and equipment, as to the minimum number of employees to be assigned to the operation of trains, as to the stopping of express trains at unimportant stations. These powers might be exercised to an unreasonable and oppressive extent and it still be difficult to show that the results were confiscatory.

It is possible, also, that the power of taxation may be so exercised by the States as to become in some degree oppressive. However, the exercise of this power must fall short of what the United States courts would find to be confiscatory, and it can not be so exercised as radically to discriminate against railway property without coming in conflict with the provision of the Constitution of the United States guaranteeing the equal protection of the laws. The tendency in the direction of increasing taxation may be illustrated by citing the fact that for the fiscal year ended June 30, 1900, the railways of the United States paid taxes levied under State, county, and municipal authority amounting to \$48,332,273, while in 1910 such taxes amounted to \$104,144,076. Part of this increase is to be accounted for by the increased mileage in 1910 as compared with 1900, but the average payments of taxes per mile in 1900 amounted to only \$254.78 as compared with \$435.65 in 1910, an increase in the ten years of \$180.87 per mile or 70.9 per cent.

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(Continued.)

14. Summary of Revenues and Expenses of Steam Roads in the United States for April, 1911.
15. The Conflict Between Federal and State Regulation of the Railways.
16. Summary of Revenues and Expenses of Steam Roads in the United States for May, 1911.
17. Railway Wage Increases for the year ending June 30, 1911. Retrenchment in the Railway Labor Force in 1911.
18. Capitalization and Dividends of the Railways of Texas, Year Ending June 30, 1909.

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